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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

21 OWEN DIAZ,

Case No. 3:17-cv-06748-WHO

22 Plaintiff,

**DEFENDANT TESLA, INC.'S RESPONSE  
TO PLAINTIFF'S NOTICE OF NEW  
EVIDENCE IN SUPPORT OF RENEWED  
MOTION FOR MISTRIAL AND MOTION  
FOR A NEW TRIAL.**

24 TESLA INC d/b/a TESLA MOTORS INC

Trial Date: March 27, 2023  
Judge: Hon. William H. Orrick

**REDACTED FOR PUBLIC FILING**

1 Pursuant to the Court’s August 8, 2023 Order Requiring Response from Defendants (Dkt.  
 2 486), Tesla hereby responds to Plaintiff Owen Diaz’s Notice of New Evidence in Support of  
 3 Renewed Motion for Mistrial and Motion for New Trial (Dkt. 485, “Notice of New Evidence”).

4 **INTRODUCTION**

5 Mr. Diaz’s Notice of New Evidence is premised on the baseless assertion that Tesla should  
 6 have produced [REDACTED]

7 [REDACTED] and that Tesla’s failure to produce the documents entitles him to a third trial  
 8 on damages. Tesla was not obligated to produce the documents because they were not from the files  
 9 of the custodians whose records Tesla was required to review. Nor, in any event, did the absence  
 10 of the documents at trial cause prejudice to Mr. Diaz. The [REDACTED]

11 [REDACTED]  
 12 [REDACTED]. At best, they are cumulative of other [REDACTED]

13 [REDACTED] Nor did Tesla exploit the absence  
 14 of [REDACTED] at trial. Indeed, at the first trial, which did not include the subject emails, Mr. Diaz  
 15 convinced a jury to award him one of the largest single plaintiff damages awards in *history*. In light  
 16 of this, Mr. Diaz cannot possibly prove by “clear and convincing evidence”—as he must—that the  
 17 absence of the documents from the damages-only retrial “substantially interfered” with his ability  
 18 to present his case. Nor, in any event, could Mr. Diaz rely on this new “evidence” [REDACTED]

19 [REDACTED] during the damages retrial consistent with the Court’s evidentiary rulings because that  
 20 evidence was absent from the liability trial on which the damages must be based. The Court should  
 21 deny Mr. Diaz’s request for further briefing on the issues he raises.

22 **ARGUMENT**

23 **I. MR. DIAZ IDENTIFIES NO DISCOVERY MISCONDUCT BY TESLA**

24 As the Court requested (Dkt. 486 at 1), Tesla submits herewith under seal, and has served  
 25 on Mr. Diaz’s counsel, unredacted copies of documents Tesla produced in a separate state-court  
 26 litigation, *Vaughn v. Tesla, Inc.*, Alameda Superior Court No. RG17882082 (“*Vaughn*”), labeled as  
 27

28

1 TSLA(VGN) 26869, 27092, 27095, 26870, and 27094. (Declaration of Daniel C. Posner ("Posner  
 2 Decl."), Exs. A-E (the "*Vaughn* Documents").)<sup>1</sup>

3 Mr. Diaz errs in asserting that Tesla was obligated to produce the *Vaughn* Documents during  
 4 discovery. The relevant Joint Discovery Letter and related Court order required Tesla to run search  
 5 terms for certain racial epithets only in the "emails and documents of HR partners in plaintiffs'  
 6 departments." (Dkt. 93 (Order) at 2; Dkt. 88 (Joint Discovery Letter) at 4.) In this search, Tesla did  
 7 [REDACTED]

8 [REDACTED] However, none of  
 9 the senders or recipients of the *Vaughn* Documents were HR partners in Mr. Diaz's (or the other  
 10 plaintiffs') departments. (Declaration of Jessica Quon-Vaili, ¶ 4.) Accordingly, Tesla had no  
 11 obligation in this case to find or produce the *Vaughn* Documents. The fact that they were found in  
 12 *Vaughn* is not to the contrary, for *Vaughn* is a putative class action with a much broader scope of  
 13 discovery and is not governed by the same discovery protocol that the Court approved here.

14 **II. MR. DIAZ IDENTIFIES NO PREJUDICE**

15 Even if Tesla had been obligated to produce the *Vaughn* Documents (and it was not), Mr.  
 16 Diaz cannot meet his burden to prove "by clear and convincing evidence" that the absence of these  
 17 documents "substantially interfered with" his "ability to fully and fairly present his case" in the  
 18 damages retrial. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (applying the  
 19 Rule 60(b)(3) test and standard to a Rule 59 motion for new trial based on alleged discovery  
 20 misconduct). Mr. Diaz must establish the *Vaughn* Documents' "likely worth as trial evidence," or  
 21 "value as a tool for obtaining meaningful discovery" of evidence probative of an important issue in  
 22 this trial. *Id.* Evidence that is "merely corroborative or cumulative" does not meet this exacting  
 23 burden. *See id.; Allstate Indem. Co. v. Lindquist*, 2022 WL 1801027, at \*5 (W.D. Wash. June 2,  
 24 2022) (holding that plaintiff failed to establish that the alleged discovery conduct would have caused  
 25 "substantial interference" with its ability to present its case).

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28 <sup>1</sup> Tesla's disclosure of unredacted versions of the documents is not a waiver of any  
 confidentiality designation in *Vaughn*. Tesla reserves all rights in and related to *Vaughn*.

1 To begin, any argument that Mr. Diaz was unfairly deprived of the opportunity to introduce  
2 the *Vaughn* Documents in support of his damages claim in the retrial cannot be squared with this  
3 Court's rulings on the scope of evidence for that trial. The Court ruled that the evidence in the  
4 damages retrial was limited to the exhibits that were admitted and the witnesses who testified during  
5 the first trial. (Dkt. 376.) As a result, the jury in the retrial was permitted to determine damages  
6 based only on the first jury's liability verdict and the evidence from which it made that finding  
7 (Dkts. 376; 417 at 2; 456 (Final Jury Instructions) at Instruction No. 24); allowing the introduction  
8 of these documents in the damages-only retrial would necessarily invite the second jury to render  
9 an award based on an incident for which Tesla was not found liable by the first. And because Mr.  
10 Diaz does not seek a new trial on liability or claim he was prejudiced in the first trial by the absence  
11 of the *Vaughn* Documents—nor could he in light of the first jury's verdict in his favor—the *Vaughn*  
12 Documents cannot support a motion for new trial on damages.

13 In any event, even if it were possible for Mr. Diaz to rely on the *Vaughn* Documents at a  
14 damages retrial, no “clear and convincing” evidence exists to order a third damages trial based on  
15 his inability to rely on these documents [REDACTED]

16 *First*, contrary to Mr. Diaz's assertion (Dkt. 485 at 3, 6), the *Vaughn* Documents do not  
17 contradict any factual assertions Tesla made or implied in its cross examination of any witness at  
18 trial. [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 Nor do the *Vaughn* Documents contradict any statements Tesla made in or any implications  
25 drawn from Tesla's cross-examinations [REDACTED]

26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 ***Second***, the *Vaughn* Documents are irrelevant to Mr. Diaz's damages because there is no  
8 evidence that [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 ***Third***, the *Vaughn* Documents would not have led to the discovery of more documents or  
14 information that "could well have been probative," *Allstate Indem*, 2022 WL 1801027, at \*5, on any  
15 important issue relating to Mr. Diaz's emotional distress damages. At best, the Documents are  
16 cumulative of other evidence [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 [REDACTED] Mr. Diaz claims that a new trial is warranted because he "could have taken  
20 further discovery into the incident described and depicted, including by deposing" the recipients on  
21 the email chain (Dkt. 485 at 5), but such a claim could be made for any document not produced in  
22 any case. There is no indication that these documents could have led to discovery so meaningful  
23 that it would have impacted the amount of damages the second jury awarded.

24 ***In sum***, Mr. Diaz seeks a third trial on emotional distress damages based on Tesla's  
25 purported failure to produce documents that were outside of the Court's discovery order because  
26 they involved custodians from whom Tesla was not required to collect, review, or produce  
27 documents. Moreover, the documents relate [REDACTED]  
28 [REDACTED]

1 [REDACTED] In any event,  
2 Mr. Diaz cannot use these documents in a damages retrial under the Court's orders limiting evidence  
3 at any damages trial to evidence admitted in the first trial and requiring that damages be assessed  
4 based on the liability findings from the first trial. The *Vaughn* Documents provide no grounds for  
5 further briefing on the pending post-trial motions, and certainly no justification to grant a new trial  
6 or sanctions.

7 **CONCLUSION**

8 The Court should deny Mr. Diaz's request for further briefing on his motion for new trial.  
9

10 DATED: August 15, 2023

11 By: /s/ Daniel C. Posner

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